

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

November 8, 2000 Session

KELLY RAE GRAY v. DAVID WAYNE GRAY

**Appeal from the Chancery Court for Rutherford County
No. 98DR-1321 Royce Taylor, Chancellor**

No. M2000-00620-COA-R3-CV - Filed March 7, 2001

This is an appeal from a trial court order regarding child support. The trial court ordered the Father, with whom the children spend the night, to make child support payments to the Mother, who picks the children up from school, feeds them supper, and supervises them until 6:00 p.m. The Father appealed on the grounds that he as the custodial parent cannot be ordered to pay child support payments to the non-custodial parent. We affirm the trial court's order.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed and Remanded**

BEN H. CANTRELL, P.J., M.S., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., and PATRICIA COTTRELL, JJ., joined.

M. Keith Siskin, Murfreesboro, Tennessee, for the appellant, David Wayne Gray.

William W. Burton, Murfreesboro, Tennessee, for the appellee, Kelly Rae Gray.

OPINION

I.

Kelly Rae Gray and David Wayne Gray were married in August of 1986. Their first child, Nicholas Wayne Gray, was born January 14, 1987. A second child, Dakota Ray Gray, was born October 22, 1991. The parties separated in September of 1998, and the Mother filed for divorce in October of 1998 on the ground of irreconcilable differences. David Gray filed a counterclaim for divorce on the ground of inappropriate marital conduct. The trial court conducted a hearing on September 30, 1999 and issued a final decree of divorce on November 5, 1999.

The Final Decree awarded a divorce to David Gray on the grounds of Kelly Gray's post-separation adultery. The decree included a parenting plan in which David Gray was designated as the custodian of the children. However, Kelly Gray was responsible for picking up the children

every day after school and keeping them until 6:00 p.m. She was ordered to be responsible for any after-school activities, homework, and dinner for the children. She was also ordered to provide lunch money and to pay for after-school activities. The Father was ordered to pay for school supplies and activities during the school day. The marital home and surrounding property remained in both parties' names as tenants in common until the youngest child turns eighteen, and the Father was awarded exclusive use of the property until that time. When the youngest child reaches 18, the Father and Mother will be free to manage the property as they wish.

Each party is to have the children every other weekend. The weekends the Father has the children, he is responsible for picking them up from school on Friday afternoon. When the Mother has the children for the weekend, she is responsible for getting the children to their Father on Sunday. The trial judge also called for the parents to share custody of the children equally for Winter, Spring and Summer vacations. Holidays are to be alternated between the two parents.

The Father was designated as the custodian of the children for the purposes of any state or federal statute. However, this designation does not affect the rights or responsibilities of either party. The Mother is also responsible for having a health insurance policy on the children. The two parties will split any deductibles due for health care. They will each claim one child for a tax deduction.

The trial court stated in the Parenting Plan, "Each party will be responsible for paying the statutorily-mandated 32% to the other party. Due to income differentials, this leaves a \$737.00 difference for the Father to pay to the Mother. In light of Father's extensive time with the children, however, Father's support obligation will be reduced to \$600.00 per month, which will be paid directly from the Father to the Mother."

II.

There is one issue on appeal in this case. The Father has appealed the trial court's decision to award child support to the Mother. The Father's argument is that he is the custodial parent; therefore, he should not be ordered to pay child support.

In a child custody case, we review the record of the trial court de novo with the presumption that the decision of the trial court with respect to the facts is correct unless the evidence preponderates against such factual determinations. Tenn. R. App. P. 13(d); *Brooks v. Brooks*, 992 S.W.2d 403, 404 (Tenn. 1999).

In *Caldwell v. Caldwell*, No. 03A01-9404-CV-00151, 1995 WL 328226 (Tenn. Ct. App. Aug. 26, 1996), one of the issues was whether a trial court had the authority to require a custodial parent to make child support payments to a non-custodial parent. In that case, the trial court awarded child support payments to the father, who was the non-custodial parent, during the summer months the minor child lived with him. The remainder of the year, the child lived with his mother who received payments from the father. In addressing this issue, we stated:

We are not willing to make a blanket statement that under no circumstances can a custodial parent be ordered to pay child support. In the first place, we are not aware of any Tennessee case authority so holding. Second, in this day of joint custody, split custody, shared custody and the like, we are not confident in our ability to anticipate all of the various custodial arrangements that may come up and how those arrangements might affect the support needs of minor children.

Caldwell, No. 03A01-9404-CV-00151 at * 2 (Tenn. Ct. App. Aug. 26, 1996). We still know of no Tennessee authority that forbids the paying of child support by a custodial parent to a non-custodial parent.

There is a rebuttable presumption that the Child Support Guidelines provide the correct amount of child support to be paid by the obligor parent. Tenn. Code Ann. § 36-5-101(e)(1). The “obligor” is the parent with whom the children do not primarily live. Tenn. Comp. R. & Regs. 1240-2-4-.03(1). The amounts listed in the Guidelines assume that one parent will have primary physical custody and that the other parent will have the children for overnight visitation from Friday to Sunday every other week, two weeks in the summer, and two weeks during the holidays throughout the year. Tenn. Comp. R. & Regs. 1240-2-4-.02(6). The courts are allowed to deviate from the Guidelines. Tenn. Comp. R. & Regs. 1240-2-4-.04(2)(b). Where the time is more evenly divided the courts must make a case-by-case determination as to the appropriate amount of support. Tenn. Comp. R. & Regs. 1240-2-4-.02(6).

Because this custody arrangement is along the lines of joint custody, neither parent appears to have primary custody. Although the Mother is not considered the custodial parent, she shoulders a great deal of the daily responsibility of caring for the children. She picks them up after school, supervises their homework, pays for any after-school activities and their lunch, as well as feeding them supper before their Father picks them up. He gets them ready for bed and off to school in the morning, as well as paying for school supplies and activities during school.¹ The Mother also helps provide a home for the children. She is a joint owner of the marital home where the children spend their nights with their Father. We consider this a significant contribution by her.

The appellant cites two unreported cases from this court for the proposition that the only relevant inquiry under the Child Support Guidelines is the income of the parent with whom the children do not primarily reside. *See Robertson v. Robertson*, No. 03A01-9711-CV-00511, 1998 WL 783339, at * 4 (Tenn. Ct. App. Nov. 9, 1998); *Hansen v. Hansen*, No. E1999-02666-COA-R3-CV, 2000 WL 486808, at * 4 (Tenn. Ct. App. Apr. 26, 2000). This result is derived from the Child Support Guidelines, Tenn. Comp. R. & Regs. 1240-2-4-.03, which defines the obligor (for child support) as “the parent with whom the child(ren) do not primarily live,” and sets the amount the

¹There is evidence in the record that the Father does not feed the children breakfast, but rather drops them off at his sister’s house before school for break fast.

obligor parent shall pay to the obligee parent. Under the standard formula, therefore, the courts are only concerned with the amount the obligor should pay.

Where the time is more evenly divided, however, and the courts are allowed to deviate from the Guidelines, we think the deviation may include the re-alignment of the obligor and obligee – where the best interests of the children require it. *See* Tenn. Comp. R. & Regs. 1240-2-4-.04(2)(b). In this case, the trial judge obviously thought the best interest of the children would be served by having the Mother take care of them after school. In view of her increased time with the children and the substantial and unusual contributions she makes to their support, we think the trial judge was justified in ordering the Father to make child support payments to the Mother.

The Guidelines also require that the trial court make “a written finding that the application of the Child Support Guidelines would be unjust or inappropriate in that particular case in order to provide for the best interest of the child or the equity between the parties and the court must show what the child support award would have been without the deviation.” Tenn. Comp. R. & Regs. 1240-2-4-.01(3). We have quoted the trial court’s finding with respect to how and why the court arrived at the amount the Father should pay to the Mother. We think the trial court’s finding satisfies the Guidelines’ requirement.

The judgment of the trial court is affirmed and the cause is remanded to the Chancery Court of Rutherford County for any further proceedings that may become necessary. Tax the costs on appeal to the appellant, David Wayne Gray.

BEN H. CANTRELL, PRESIDING JUDGE, M.S.